

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Benton Gene Baskin,
Plaintiff,

v.

Todd Thomas, et al.,
Defendants.

No. CV 21-01890-PHX-SPL (JFM)

ORDER

On November 8, 2021, Plaintiff Benton Gene Baskin, a Kansas prisoner who then appeared to be confined in the Saguaro Correctional Center (SCC) in Eloy, Arizona, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983, an Application to Proceed In Forma Pauperis (Doc. 2), and a motion to appoint counsel (Doc. 3). The same day, a notice of assignment was docketed and mailed to Plaintiff at SCC, which appeared as his address of record (Doc. 4) on his Complaint. On November 18, 2021, the copy of the notice of assignment mailed to Plaintiff was returned as undeliverable (Doc. 5). In a December 15, 2021 Order, the Court denied the deficient Application to Proceed and gave Plaintiff 30 days to pay the filing and administrative fees or file a complete Application to Proceed In Forma Pauperis (Doc. 6).¹ Copies of that Order mailed to Plaintiff at the SCC address were returned as undeliverable (Doc. 7). After Plaintiff failed to either pay the filing and administrative fees or file a properly completed Application to Proceed In Forma Pauperis, the Clerk of Court entered Judgment of dismissal (Doc. 8). A copy of the Judgment sent

¹ The Court also denied the motion to appoint counsel.

1 to Plaintiff at SCC was returned as undeliverable (Doc. 9).

2 On August 4, 2022, Plaintiff sent a letter to the Court (Doc. 10) that listed a return
3 address at the Hutchinson Correctional Facility (HCF) in Hutchinson, Kansas. In the letter,
4 Plaintiff stated that he “evidenced his new address” on November 1, 2021, but never
5 received an acknowledgment. Plaintiff claimed that the return address on the letter was
6 “and always has been” his up-to-date address. However, the return address on his
7 Complaint was for SCC not HCF, and the SCC address was entered on the docket. (Doc.
8 1 at 1.) Nevertheless, because HCF was listed as the return address on the envelope in
9 which Plaintiff mailed his Complaint and an October 21, 2021 letter addressed to the Clerk
10 of Court, the Court vacated entry of Judgment and reopened this case. Plaintiff then paid
11 the filing and administrative fees (Doc. 13). The Court will order Defendants Giaboian,
12 Diaz, and Westbrook to answer Plaintiff’s threat-to-safety claim (Count II) of the
13 Complaint and will dismiss the remaining claims and Defendants without prejudice.

14 **I. Statutory Screening of Prisoner Complaints**

15 The Court is required to screen complaints brought by prisoners seeking relief
16 against a governmental entity or an officer or an employee of a governmental entity. 28
17 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
18 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
19 relief may be granted, or that seek monetary relief from a defendant who is immune from
20 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

21 A pleading must contain a “short and plain statement of the claim *showing* that the
22 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
23 not demand detailed factual allegations, “it demands more than an unadorned, the-
24 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
25 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
26 conclusory statements, do not suffice.” *Id.*

27 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
28 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,

1 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 2 that allows the court to draw the reasonable inference that the defendant is liable for the
 3 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 4 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 5 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 6 allegations may be consistent with a constitutional claim, a court must assess whether there
 7 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

8 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 9 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 10 (9th Cir. 2010). A “complaint [filed by a pro se prisoner] ‘must be held to less stringent
 11 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 12 U.S. 89, 94 (2007) (per curiam)).

13 **II. Complaint**

14 In his three-count Complaint, Plaintiff alleges claims for denial of constitutionally
 15 adequate medical care, threat to safety, and Eighth Amendment deliberate indifference.
 16 Plaintiff sues the following employees of SCC: Warden Todd Thomas, Licensed Practical
 17 Nurse (LPN) Gerald Walker, and Registered Nurse (RN) Marci Gottfredson. Plaintiff also
 18 sues Supervisor Westbrook, who worked for TransCorporation of America (TCA) at
 19 relevant times. He further sues HCF Warden Daniel Schnurr; HCF Special Operations
 20 Response Team (SORT) Lieutenant Giaboian, and Sergeant Diaz. Plaintiff seeks
 21 declaratory, injunctive, and compensatory relief.²

22 Plaintiff alleges the following facts:

23 At 3:00 a.m. on October 23, 2019, Plaintiff was escorted from his Kansas cell for
 24 processing prior to being transported to Salina, Kansas, and eventually to SCC pursuant to
 25 an Interstate Corrections Compact. Defendant Westbrook supervised Plaintiff’s transport
 26 from Kansas to SCC. Defendant Giaboian applied wrist, waist, and leg restraints. Plaintiff
 27

28 ² Plaintiff’s claims for injunctive relief are moot because he is no longer in SCC
 custody.

1 has a “slim waist and thick stomach area,” and he asked Giaboian to loosen the slack so
2 that he could consume his sack meal. Giaboian ordered Plaintiff to hold his arms level
3 with his waist and applied waist, wrist, and ankle restraints. Plaintiff asked Giaboian to
4 loosen the wrist and waist restraints because he had difficulty raising his arms high enough
5 for Giaboian to secure the restraints. Giaboian unsuccessfully attempted to place a finger
6 between Plaintiff’s wrists and the restraints. Plaintiff asked Giaboian to loosen them
7 because they were too tight, noting that Giaboian had been unable to get a finger between
8 them and that his hands were bigger than his wrists. Giaboian responded the cuffs were
9 “not built for comfort” and ordered Plaintiff to board a transport vehicle.

10 After boarding and being seated in the transport vehicle, Plaintiff asked Defendant
11 Diaz to loosen the restraints because they were cutting into his arms and wrists. Diaz asked
12 Plaintiff why he had not asked Giaboian. Plaintiff responded that he had but Giaboian had
13 refused. Diaz made no further response. About five minutes later, Diaz and an unknown
14 SORT officer left the transport vehicle, and then reboarded 15-20 minutes later. They
15 brought a milk crate and cooler containing sack lunches for later distribution. Plaintiff
16 again asked Diaz to loosen his wrist restraints, but Diaz did not respond. Plaintiff then
17 asked how he was supposed to eat his meal when he could not lift his hands to his mouth,
18 but Diaz did not respond.

19 Plaintiff and another prisoner, Bemis, noticed that Plaintiff’s arm had become
20 swollen “enormously” and the cuff on Plaintiff’s right wrist had begun cutting into the
21 wrist. In obvious pain, Plaintiff again implored Diaz to adjust his wrist restraints. Diaz
22 told Plaintiff “Be patient, we have a short ride ahead of us, we will get you taken care of
23 then.” (*Id.* ¶ 24.) Plaintiff was forced to endure the 90-minute trip in pain, while the
24 transport vehicle went to El Dorado Correctional Facility (EDCF) to pick up more
25 prisoners.

26 When the vehicle arrived at EDCF, at about 4:30 a.m., Diaz and the unknown SORT
27 officer checked their weapons at the security tower. Plaintiff “irritably” complained to
28 both about his swollen wrists and pain, but both ignored his request to loosen the cuffs.

1 (*Id.* ¶ 26.) After passing the inspection point, Diaz drove the transport vehicle into the sally
2 port and docked it. After waiting 15-20 minutes, the prisoners exited from the vehicle and
3 entered EDCF. Once inside the building, which was lighted, Plaintiff and other prisoners
4 could see how swollen Plaintiff's arms and wrists were. Plaintiff spoke through the crack
5 of the holding cell door in an attempt to get the attention of SORT officers, without success,
6 and another 15-20 minutes passed.

7 Plaintiff then spotted HCF SORT Officer Reau, who signaled for the holding cell
8 door to be opened and directed Plaintiff to a seating area, where Reau tried to remove the
9 wrist restraints to adjust them. After some difficulty, Reau was able to remove the
10 restraints and saw the swelling and redness of Plaintiff's wrists and arms. After
11 experiencing difficulty re-applying the restraints, Reau concluded the restraints were too
12 small. Reau successfully re-applied the wrist restraints and waist restraints, but Reau again
13 said the restraints were too small and appealed to EDCF SORT officers telling them that
14 Plaintiff needed bigger handcuffs and described the state of Plaintiff's arms and wrists.
15 Plaintiff was briefly returned to the holding cell, then an EDCF officer took Plaintiff to the
16 nurse's station where Plaintiff's vital signs were taken. The medical provider asked
17 Plaintiff if he was taking blood pressure medication because his blood pressure was
18 "extremely high" and asked Plaintiff if he was "okay." (*Id.* ¶ 33.) Plaintiff responded
19 negatively and said that he was having an anxiety attack due to the restriction of blood flow
20 to his arms, wrists, and hands.

21 Plaintiff asked the provider and EDCF officers to assist him in being fitted with
22 larger hand cuffs, but they "deflected" responsibility to Defendant Diaz and said there was
23 nothing that they could do about the swelling or the cuffs cutting into Plaintiff's wrists and
24 arms. (*Id.* ¶ 34.) They escorted Plaintiff back to the holding cell.³

25 At about 6:00 a.m., the prisoners, Defendant Diaz, and the unknown SORT officer
26 departed from EDCF. Plaintiff again asked them to adjust his waist and cuffs because of

27
28 ³ Although Plaintiff claims that the "Corizon Medical Provider, EDCF Officers,
Defendant Diaz, and unknown [SORT] officer" were deliberately indifferent to his pain,
Plaintiff only sues Defendant Diaz.

1 the swelling of his arms and wrists. Plaintiff asked how long until they reached the Salina
2 airport. They turned up the radio and heater and ignored Plaintiff.

3 Plaintiff and the other prisoners arrived at the Salina airport at about 8:00 a.m.
4 Plaintiff again pointed out the effects of his tight restraints and again asked Diaz how he
5 was supposed to eat meals when he could not reach his mouth. Diaz again ignored Plaintiff.

6 After about 30 minutes, two unknown men boarded the transport vehicle and
7 identified themselves as TCA employees. The supervisor identified himself as Mr.
8 Westbrook. Plaintiff informed Defendant Westbrook about the tight restraints causing
9 swelling of his arms and wrists. Defendant Westbrook responded that as soon as the plane
10 was ready for boarding, his employees would make necessary adjustments to each
11 prisoner's wrist restraints. Plaintiff had to wait at least another 90 minutes, while other
12 transport vehicles arrived. Plaintiff asked Westbrook if he could bring his sack meal aboard
13 the plane, but Westbrook said no. Non-party TCA employee Payne opened some of the
14 items in the sack meal and helped Plaintiff to eat them. The remainder was discarded.

15 Before exiting the transport vehicle, Plaintiff was chained to prisoners Bemis and
16 Moore. While being chained to them, Plaintiff asked the TCA staff to check how tight his
17 wrist restraints were and to adjust them. An unknown TCA officer said that someone
18 would take care of him after he was on the plane. Defendant Westbrook also reassured
19 Plaintiff that the restraints would be adjusted on the plane. After being seated on the plane
20 at approximately 9:00 a.m., Plaintiff complained to TCA staff about his pain and swelling
21 from the restraints, but they ignored him.

22 At about 11:30 a.m., Defendant Westbrook advised everyone to secure their
23 seatbelts. As the plane readied for take-off, Westbrook announced that he and his staff
24 would begin adjusting the prisoners' restraints that were too tight. TCA employees began
25 adjusting restraints from the front of the plane. As Westbrook walked down the aisle
26 towards where Plaintiff was sitting, Plaintiff pointed out the swelling to his arms and the
27 cuffs cutting his wrists. Westbrook told Plaintiff that if he asked Westbrook one more time
28 about his restraints, Westbrook would leave them as they were.

1 At some point, a TCA employee told Plaintiff, Bemis, and Moore to unfasten their
2 seat belts and step into the aisle so that he could access their restraints. The employee saw
3 the injuries to Plaintiff's wrists and "extreme swelling" of Plaintiff's arms and told
4 Westbrook that he needed some "Big-Boy Cuffs" for Plaintiff. Westbrook responded that
5 he did not have any on him, and the employee stated there were some up front. Westbrook
6 told the employee to remove the wrist restraints and then re-apply them with just one click.
7 The employee did so but saw that it did not resolve Plaintiff's issues. The employee
8 reapplied the waist and wrist restraints on Plaintiff, while telling him that he would get
9 larger cuffs from up front as soon as Westbrook authorized him to do so. Plaintiff asked
10 the employee to at least place the waist chain above his stomach, which would allow him
11 to eat the sack lunch that was being provided, and the employee did so. Plaintiff, Bemis,
12 and Moore were recharged and sat back down.

13 Plaintiff, still in pain, nevertheless fell asleep. When he awoke, Prisoner McCaslin
14 raised his arms to show Plaintiff that he had exchanged his restraints for plastic zip ties and
15 told Plaintiff to make them change his. After spotting the unknown TCA employee,
16 Plaintiff asked to either receive larger steel cuffs or plastic zip ties. The employee
17 apologized but said they had given them all out. Plaintiff continued to suffer pain
18 throughout the plane trip.

19 After the plane landed in Arizona, the prisoners, including Plaintiff, waited on the
20 plane for 90 minutes before they were loaded onto transport vehicles. Plaintiff again
21 complained to Defendant Westbrook and the unknown TCA officer and Westbrook told
22 Plaintiff they would be removed after he arrived at SCC. A TCA nurse told Plaintiff to be
23 patient and warned him not to act up because of possible retaliation from by staff. About
24 90 minutes later, Plaintiff arrived at SCC, where he continued to be cuffed for another hour
25 until he had passed through security checks, when the restraints were finally removed.

26 Following a strip search, Plaintiff pointed out his swollen arms and wrist injuries,
27 including blisters and cuts, to Defendant Thomas. Thomas voiced empathy and told
28 Plaintiff he would take care of the situation. Thomas directed Plaintiff to medical staff for

1 care once Plaintiff was scanned and passed through check points. Plaintiff was seen by
2 CoreCivic Health Services Nurse Alexander. Alexander refused to treat Plaintiff's cuts
3 and blisters and told him to submit a 13-80A3 sick call request after he was assigned to
4 housing.

5 Following Plaintiff's assignment to housing, Lieutenant Perez photographed
6 Plaintiff's injuries and said that he was willing to provide copies of the photographs to
7 Plaintiff. Overnight, Plaintiff's exposed injuries stuck to his bedding. Plaintiff notified
8 unidentified SCC staff, who told Plaintiff there was nothing they could do until orientation
9 was over. On October 27, 2019, Plaintiff gave a sick call request to an unidentified SCC
10 staff member, who "allegedly" turned it in. (*Id.* ¶ 65.)

11 At orientation, someone directed Plaintiff to report to the CoreCivic Health Services
12 Clinic. There, Defendant Walker checked Plaintiff's vital signs. Plaintiff asked Walker to
13 treat his cuts and swollen arms. Walker responded that there was nothing he could do but
14 allow the cuts to heal. Plaintiff asked for antibiotic ointment, gauze, and/or band aids, but
15 Walker denied the request.

16 Plaintiff submitted another sick call request on November 1, 2019, after receiving
17 no response to his October 27, 2019 request. Plaintiff did not receive a pass to go to
18 medical until November 15, 2019, when he was seen by Defendant Gottfredson, who told
19 Plaintiff it was too late to treat his injuries and refused to give Plaintiff her name. Plaintiff
20 submitted an Inmate Request Form to CoreCivic Health Services Administrator Barajas
21 seeking Defendant Gottfredson's name and title, and documentation of his injuries.
22 Barajas apparently provided Plaintiff with Gottfredson's name and position as a registered
23 nurse, and on December 6, 2019, Plaintiff was provided a diagram of his injuries.

24 On January 7, 2020, Plaintiff submitted an Inmate Request to Lieutenant Perez
25 requesting color photos of his injuries.

26 Plaintiff describes his efforts to exhaust administrative remedies, including
27 repeatedly seeking a response to his grievance from Defendants Thomas and Schnurr. The
28 last time Plaintiff approached Thomas about the issue, Thomas warned Plaintiff that he

1 would charge him with hindering staff and place him in segregation if Plaintiff asked about
 2 the issue again. Specifically, Plaintiff claims that when he approached Thomas, Thomas
 3 told Plaintiff that he had already replied to the grievance, that Plaintiff should have received
 4 a copy, that he had addressed the situation concerning the failure to loosen the cuffs, and
 5 that Plaintiff was seemingly unable to resist asking about his grievance. Thomas further
 6 said,

7 “I’ll tell you what Mr. Baskin, the next time you ask me about that
 8 Grievance, I’m going to put you in Segregation, and write your ass up for
 9 Hindering, But you know what Mr. Baskin, consider yourself lucky that
 10 it’s almost New Years, Happy New Year!, and don’t ask me about that
 grievance anymore.”

11 (Doc. 1 ¶ 85.)

12 Plaintiff designates **Count I** as a claim for denial of constitutionally adequate
 13 medical care, presumably during his transport to SCC and following arrival at SCC.

14 Plaintiff designates **Count II** as a claim for violation of his Eighth Amendment
 15 rights, which the Court construes as a claim for threat to safety or failure to protect.

16 Plaintiff designates **Count III** as an Eighth Amendment claim for deliberate
 17 indifference, citing his allegations concerning exhaustion.

18 **III. Failure to State a Claim**

19 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
 20 (2) under color of state law (3) deprived him of federal rights, privileges or immunities and
 21 (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th Cir.
 22 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d 1278,
 23 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific injury
 24 as a result of the conduct of a particular defendant and he must allege an affirmative link
 25 between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-
 26 72, 377 (1976).

27 To state a claim against a defendant, “[a] plaintiff must allege facts, not simply
 28 conclusions [to] show that an individual was personally involved in the deprivation of his

civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual to be liable in his or her official capacity, a plaintiff must allege injuries resulting from a policy, practice, or custom of the agency over which that individual has final policy-making authority. *See Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002). There is no respondeat superior liability under § 1983, and therefore, a defendant’s position as the supervisor of persons who allegedly violated Plaintiff’s constitutional rights does not impose liability. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676.

A. Defendants Schnurr and Thomas

Plaintiff sues HCF Warden Schnurr and SCC Warden Thomas. Plaintiff alleges that both impeded his efforts to administratively exhaust his grievances in retaliation for seeking redress via the administrative remedy process.

To the extent that Plaintiff seeks relief for these Defendants’ alleged failures to comply with prison grievance procedures, Plaintiff fails to state a claim. The alleged failure to comply with prison regulations or procedures, absent more, fails to state a claim because violation of prison policy is not tantamount to a constitutional violation. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009). Further, “[t]here is no legitimate claim of entitlement to a [prison] grievance procedure.” *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). However, if there is an established grievance procedure, the denial of access to the grievance process may state a constitutional violation. *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), *abrogated on other grounds by Shaw v. Murphy*, 532 U.S. 223 (2001); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989). The “government” to which the First Amendment guarantees a right to petition for redress of grievances includes prison authorities. *Hall*, 64 F.3d at 1279 (citing *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989)). It does not, however, entitle a prisoner

1 to a particular resolution of a grievance. Plaintiff fails to allege facts to support that he
 2 was denied access to the grievance process, and therefore fails to state a claim on that basis.

3 Plaintiff also alleges that Defendants Thomas and Schnurr retaliated against him for
 4 using the grievance process. A viable claim of First Amendment retaliation contains five
 5 basic elements: (1) an assertion that a state actor took some adverse action against an
 6 inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled
 7 the inmate's exercise of his First Amendment rights (or that the inmate suffered more than
 8 minimal harm) and (5) did not reasonably advance a legitimate correctional goal. *Rhodes*
 9 *v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265,
 10 267 (9th Cir. 1997) (retaliation claim requires an inmate to show (1) that the prison official
 11 acted in retaliation for the exercise of a constitutionally protected right, and (2) that the
 12 action "advanced no legitimate penological interest"). The plaintiff has the burden of
 13 demonstrating that his exercise of his First Amendment rights was a substantial or
 14 motivating factor behind the defendants' conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ.*
 15 *v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314
 16 (9th Cir. 1989).

17 Plaintiff asserts that Schnurr retaliated against him by failing to respond to his
 18 grievance submitted via the Kansas Department of Corrections grievance process.
 19 However, he fails to allege facts to support that Schnurr intentionally failed to respond as
 20 retaliation for Plaintiff's submission of a grievance. Thus, Plaintiff fails to state a
 21 retaliation claim against Schnurr.

22 With regard to Thomas's purported verbal threat, mere "[v]erbal harassment or
 23 abuse . . . is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983."
 24 *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (quoting *Collins v. Cundy*, 603
 25 F.2d 825 (10th Cir. 1979)); *Patrick v. Martin*, 402 F. App'x 284, 285 (9th Cir. 2010)
 26 (holding that a sexual harassment claim based only on verbal harassment is insufficient to
 27 state a claim under § 1983); *cf. Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir. 1997) ("To
 28 hold that gawking, pointing, and joking violates the prohibition against cruel and unusual

1 punishment would trivialize the objective component of the Eighth Amendment test and
2 render it absurd.”).

3 And while Thomas’s threat might serve as evidence of a retaliatory motive, it does
4 not support a retaliation claim absent an allegation that Thomas took adverse action against
5 Plaintiff. Standing alone, however, the threat itself does not rise to the level of retaliation.
6 Accordingly, Plaintiff fails to state a claim against Thomas for retaliation.

7 For the reasons discussed, Plaintiff fails to state a claim against Schnurr or Thomas
8 and they will be dismissed.

9 **B. Medical Care**

10 Plaintiff alleges that Defendants Walker and Gottfredson denied him
11 constitutionally adequate medical care. Not every claim by a prisoner relating to
12 inadequate medical treatment states a violation of the Eighth Amendment. To state a
13 § 1983 medical claim, a plaintiff must show (1) a “serious medical need” by demonstrating
14 that failure to treat the condition could result in further significant injury or the unnecessary
15 and wanton infliction of pain and (2) the defendant’s response was deliberately indifferent.
16 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

17 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d
18 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both
19 know of and disregard an excessive risk to inmate health; “the official must both be aware
20 of facts from which the inference could be drawn that a substantial risk of serious harm
21 exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
22 Deliberate indifference in the medical context may be shown by a purposeful act or failure
23 to respond to a prisoner’s pain or possible medical need and harm caused by the
24 indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a
25 prison official intentionally denies, delays, or interferes with medical treatment or by the
26 way prison doctors respond to the prisoner’s medical needs. *Estelle v. Gamble*, 429 U.S.
27 97, 104-05 (1976); *Jett*, 439 F.3d at 1096.

28 Deliberate indifference is a higher standard than negligence or lack of ordinary due

1 care for the prisoner's safety. *Farmer*, 511 U.S. at 835. "Neither negligence nor gross
2 negligence will constitute deliberate indifference." *Clement v. Cal. Dep't of Corr.*, 220 F.
3 Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458,
4 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice"
5 do not support a claim under § 1983). "A difference of opinion does not amount to
6 deliberate indifference to [a plaintiff's] serious medical needs." *Sanchez v. Vild*, 891 F.2d
7 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to
8 state a claim against prison officials for deliberate indifference. *See Shapley v. Nev. Bd. of*
9 *State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be
10 substantial. The action must rise to a level of "unnecessary and wanton infliction of pain."
11 *Estelle*, 429 U.S. at 105.

12 Plaintiff appears to assert that Walker denied him constitutionally adequate medical
13 care for cuts to his arms and wrists that he suffered after being tightly restrained during
14 travel from Kansas to Arizona. Essentially, Plaintiff disagrees with Walker's denial of
15 antibiotic ointment and bandages for his cuts. As noted above, mere disagreement with a
16 medical provider's determination regarding medically appropriate treatment, and the need
17 therefor, is not sufficient to support that Walker acted with deliberate indifference to a
18 serious medical need. Plaintiff's medical care claim against Walker will therefore be
19 dismissed.

20 With regard to Gottfredson, Plaintiff alleges that when he was seen by this
21 Defendant on November 15, 2019, she told Plaintiff that it was "too late" to treat his
22 injuries, presumably because they had healed. However, Plaintiff does not allege facts to
23 support that the injuries he suffered when he was transferred from Kansas rose to the level
24 of a serious medical need. Moreover, as noted above, Plaintiff's disagreement with
25 Gottfredson's determination that there was nothing to be done, absent more, is insufficient
26 to support that she acted with deliberate indifference. Accordingly, Plaintiff fails to state
27 a claim against Gottfredson, and she will be dismissed.

28

1 **IV. Claim for Which an Answer Will Be Required**

2 Plaintiff sufficiently alleges facts to support that Defendants Giaboian, Diaz, and
3 Westbrook acted with deliberate indifference to a threat to Plaintiff's safety by repeatedly
4 failing to adjust Plaintiff's restraints, particularly the failure to adjust his wrist restraints
5 for hours. These Defendants will therefore be required to respond to Count II.

6 **V. Warnings**

7 **A. Address Changes**

8 Plaintiff must file and serve a notice of a change of address in accordance with Rule
9 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
10 relief with a notice of change of address. Failure to comply may result in dismissal of this
11 action.

12 **B. Copies**

13 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a
14 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
15 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff
16 must submit an additional copy of every filing for use by the Court. *See* LRCiv 5.4. Failure
17 to comply may result in the filing being stricken without further notice to Plaintiff.

18 **C. Possible Dismissal**

19 If Plaintiff fails to timely comply with every provision of this Order, including these
20 warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*,
21 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure
22 to comply with any order of the Court).

23 **IT IS ORDERED:**

24 (1) Counts I and III are **dismissed** without prejudice.

25 (2) Defendants Thomas, Walker, Gottfredson, and Schnurr are **dismissed**
26 without prejudice.

27 (3) Defendants Giaboian, Diaz, and Westbrook must answer Count II as set forth
28 herein.

1 (4) The Clerk of Court must send Plaintiff a service packet including the
2 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
3 Defendant Giaboian, Diaz, and Westbrook.

4 (5) Plaintiff must complete and return the service packet to the Clerk of Court
5 within 21 days of the date of filing of this Order. The United States Marshal will not
6 provide service of process if Plaintiff fails to comply with this Order.

7 (6) If Plaintiff does not either obtain a waiver of service of the summons or
8 complete service of the Summons and Complaint on a Defendant within 90 days of the
9 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
10 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
11 16.2(b)(2)(B)(ii).

12 (7) The United States Marshal must retain the Summons, a copy of the
13 Complaint, and a copy of this Order for future use.

14 (8) The United States Marshal must notify Defendants of the commencement of
15 this action and request waiver of service of the summons pursuant to Rule 4(d) of the
16 Federal Rules of Civil Procedure. The notice to Defendants must include a copy of this
17 Order.

18 (9) A Defendant who agrees to waive service of the Summons and Complaint
19 must return the signed waiver forms to the United States Marshal, not the Plaintiff, **within**
20 **30 days of the date of the notice and request for waiver of service** pursuant to Federal
21 Rule of Civil Procedure 4(d)(1)(F) to avoid being charged the cost of personal service.

22 (10) The Marshal must immediately file signed waivers of service of the
23 summons. If a waiver of service of summons is returned as undeliverable or is not returned
24 by a Defendant within 30 days from the date the request for waiver was sent by the Marshal,
25 the Marshal must:

26 (a) personally serve copies of the Summons, Complaint, and this Order
27 upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure;
28 and

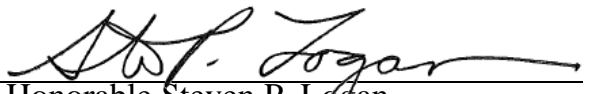
1 (b) within 10 days after personal service is effected, file the return of
2 service for Defendant, along with evidence of the attempt to secure a waiver of
3 service of the summons and of the costs subsequently incurred in effecting service
4 upon Defendant. The costs of service must be enumerated on the return of service
5 form (USM-285) and must include the costs incurred by the Marshal for
6 photocopying additional copies of the Summons, Complaint, or this Order and for
7 preparing new process receipt and return forms (USM-285), if required. Costs of
8 service will be taxed against the personally served Defendant pursuant to Rule
9 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the
10 Court.

11 (11) Defendants must answer the Complaint or otherwise respond by appropriate
12 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
13 Rules of Civil Procedure.

14 (12) Any answer or response must state the specific Defendant by name on whose
15 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
16 does not identify the specific Defendant by name on whose behalf it is filed.

17 (13) This matter is referred to Magistrate Judge James F. Metcalf pursuant to
18 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
19 authorized under 28 U.S.C. § 636(b)(1).

20 Dated this 3rd day of October, 2022.

21 
22 Honorable Steven P. Logan
23 United States District Judge
24
25
26
27
28